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IN THE

Supreme Court of the United States

October Term, 1966

No. 254

THEODORE STOVALL,

Petitioner,

vs.

WILFRED DENNO, Warden of Sing Sing Prison, Ossining, New York,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NEW YORK STATE DISTRICT ATTORNEYS' ASSOCIATION *AMICUS CURIAE*

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Questions Presented

(1) Is evidence, obtained by viewing the person of the defendant, following his arraignment on a criminal charge and without the attendance of counsel, excludable as offensive to the Sixth Amendment's guarantee of the assistance of counsel?

(2) In the present circumstances, where the defendant proved and used the evidence of a prior identification, is he precluded from asserting the alleged unconstitutionality of its acquisition?

Interest of *Amicus*

The New York State District Attorneys' Association is an intrastate organization of county prosecutors devoted to improving the quality of law enforcement. While the Association supports the positions taken by both respondent and the Attorney General of the State of New York, *amicus curiae,* its concern in this brief, filed with the consent of the parties, is limited to the scope of the Sixth Amendment's guarantee of the assistance of counsel to an accused in a criminal prosecution, and the constitutional magnitude of any deprivation thereof in the present circumstances.

POINT I

The right of an accused to counsel, guaranteed by the Sixth Amendment, does not extend to extrajudicial events where no legal service can be rendered.

On the morning following his arrest for homicide, the petitioner was arraigned, at which time he stated his desire to retain an attorney. Consigned to the custody of local police for delivery to the sheriff, petitioner was taken to a nearby hospital on the way to the jailhouse. There Mrs. Behrendt, a physician widowed the previous evening when her husband was murdered before her eyes, clung uncer-

tainly to life after an operation to repair the wounds she had suffered during that attack. Confronted with the petitioner, Mrs. Behrendt identified him as her assailant and her husband's murderer. At the trial, evidence of the prior bedside identification was adduced from other witnesses by the defense; then Mrs. Behrendt herself took the stand, identified the defendant, and confirmed the hospital identification. In addition to Mrs. Behrendt's eyewitness testimony, "massive evidence" irresistibly pointed to the petitioner's guilt (R32).

Among petitioner's constitutional claims is an assertion that his Sixth Amendment right to counsel was violated when he was brought to Mrs. Behrendt's hospital bedside without representation. He places great emphasis on the fact that this confrontation occurred after his arraignment. But the Sixth Amendment's protection was inappropriate to that occasion, and hence the petitioner enjoyed no constitutional right to the attendance of a lawyer. The temporal happenstance of the immediately preceding arraignment did not mechanically trigger an all-covering umbrella; the right to counsel after the commencement of court proceedings is more selectively shielding.

Fundamentally, the right to counsel, the child of an adversary system of justice, protects by empowering the accused to meet, challenge, parry, and riposte against a presumably well-armed advocate of guilt. Civilization demands that the field of combat be a court of law, where the defendant's champion is professionally equipped to countervail within the peculiar framework of the legal process. Here, the battle is transmuted into an orderly dialectic. How gross a perversion of the benefits of legal counsel were

the contest permitted to overleap the metes of the courtroom and rage in the streets. Surely, the principle governing the right does not direct that counsel devote his energy and talent to blocking the fair and lawful discovery and evaluation of evidence. Such service, albeit in the interests of the accused, is not within the compass of legal representation.

The point at which the right to an attorney's assistance materializes is, appropriately, the point at which the case moves into the court: arraignment. This event signals a need for professional services professionally rendered; the right responds to the need. But the point of arraignment is not an arbitrary time-spot in the maturing of a prosecution, nor is providing a lawyer a ceremonial rite. Hence his guard is thereafter necessary only at "critical stages," which means, simply, when there is law work to be done. He is not required at all times and places after arraignment where something may occur which could adversely affect the defendant. Affording no opportunity for the performance of legal services, many events lawfully transpire without the participation of counsel. For example, the prosecutor interviews witnesses, evidence is subjected to laboratory analysis, or a photograph is taken of the scene. Nor is counsel's presence obligatory merely because the person of the defendant is involved in the occurrence: the defendant confides in a friend, his fingerprints are taken or blood is drawn for analysis. That a lawyer, or for that matter any third person, might learn from these events, or suggest other modes of performance of investigatory tasks, does not endow the attorney or other third party with the right of presence or participation. Nor does the accused acquire the right to have such a person present from

the possibility of contingent benefit. The right to legal services cannot include the right to supervise a laboratory procedure or a line-up.

Certainly, the right to effective representation reaches beyond the courtroom to the extent that a lawyer must have the opportunity to prepare. But preparation is an affirmative concept. A defense is not prepared by attempting to influence the prosecution's development of evidence. Here a separation of functions must be preserved. As the prosecutor enjoys no privilege to attend the defense counsel's interviews with witnesses or other factual forays, no reciprocal right can be claimed by the defense. For these preparatory phases of a case are and should be independently pursued. Indeed, joint development of evidence would subject both sides to charges of collusion, jeopardizing the jury's traditional fact-finding role.

A textual analysis of the Sixth Amendment confirms this view of the proper role of legal counsel, and thereby defines the bounds of the accused's right to representation. The right to counsel is couched among several other guarantees, obviously deemed by the framers to be united in a common genre. A "speedy and public trial" must be accorded before "an impartial jury" impaneled in a previously defined district which encompasses the site of the crime. It is requisite that the "nature and cause of the accusation" be presented to the defendant, that he have the opportunity of confronting his accusers (in court), and that he have access to "compulsory process for obtaining witnesses." Each of these significant Sixth Amendment guarantees is firmly and exclusively related to judicial pro-

ceedings. The last on the list, the right to "the assistance of counsel for his defense," is bound to its predecessors by its primary orientation to court activities.

Moreover, the clause itself announces not a right of counsel, but a right to the "assistance" of counsel. The inclusion of this term in the constitutional language is not without significance. Its import harmonizes with the context. Assistance is required where assistance can be rendered. And legal assistance to a defendant is normally requisite in a courtroom, preparatory to entering a courtroom, or, in very limited instances, where important legal decisions must be made by the defendant outside the courtroom.

The authorities further demonstrate that this essential right is associated with courts and what happens within them. In 1961, this Court took the position that the Sixth Amendment commands a lawyer's presence at the accused's side in court when, under local law, there is vital legal counselling to be done. Since, under Alabama law, defenses must be raised at arraignment or lost irretrievably, this was deemed a "critical stage" and "[o]nly the presence of counsel could have enabled [the] accused to know all the defenses available" [*Hamilton* v. *Alabama*, 368 U. S. 52, 59 (1961)].

Subsequent to the foreordained decision of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), in which the right to counsel at trial was extended to all those accused of felony in state tribunals, this Court again considered the question of a defendant's right to counsel at a preliminary proceeding. In *White* v. *Maryland*, 373 U. S. 59 (1963), the Court

relied on the "critical stage" doctrine of *Hamilton* (*supra*). If a withdrawn guilty plea can be proved at trial as an admission, the Court reasoned, then there were legal offices to be performed at the stage at which it was entered, and hence the constitutional injunction is activated.

In contrast to the real and substantial need for legal services which was held to generate the right to counsel in these cases, neither the dissent below nor petitioner here has been able to discover a lawyer's function in Mrs. Behrendt's hospital room. Instead, they hypothesize various practical suggestions counsel might have made, such as attempting to round up some hospital personnel for a line-up. This approach is faulty on two counts. Such cooperative suggestions to improve the probative quality of the identification are hardly the equivalent of a legally skilled decision as to what defenses to assert at arraignment. Second, any suggestions which counsel might offer would be advisory only. It is now clear that a suspect enjoys no constitutional immunity against subjecting himself (including his voice timbre) to physical scrutiny which may reveal guilt, and further, it is established that his counsel cannot create such immunity by asserting it [*Schmerber* v. *California*, 384 U. S. 757 (1966). See also, *Kennedy* v. *United States*, 353 F.2d 462, 464 (D. C. Cir. 1965)]. In the light of these precepts, the legal uselessness of counsel in the hospital room is distinctly discernible.

Even Judge FRIENDLY, for the panel majority below, grants the unlikelihood that counsel's presence in the hospital room would have altered events, and notes that such requests as he might interpose could have been refused

without denial of any federally protected rights [R31]. And the *en banc* reversal [per MOORE, C.J.] of Judge FRIENDLY's decision forcefully eradicates any lingering belief that a lawyer could have done anything to "thwart the identification," since no evidence was there obtained which counsel could have "rightfully advised Appellant to refuse to yield" [R48-49; *Kennedy* v. *United States*, 353 F.2d 462 (D. C. Cir. 1965)]. Moreover, the inutility of lawyers at viewing proceedings has been attested by the experience of the Police Department in Philadelphia, Pennsylvania. There, for more than two years, the police have advised counsel before placing their incarcerated clients in line-ups.* Not once has a lawyer appeared at these proceedings [see Appendix I, p. A1, *infra*].

Massiah v. *United States*, 377 U. S. 201 (1964) appears to stand virtually alone against strict court-bound scope for the right to counsel. [See FRIENDLY, C. J., dissenting from the *en banc* decision below (R56, n. 3).] Based on the counsel clause, the Court reversed a conviction for the use of evidence obtained outside the courtroom from the accused after indictment in the absence of his lawyer.

Yet there is grave danger in over-reading that opinion. Justice STEWART, its author, recognizing that the holding might be misapplied to inhibit post-indictment investigation, took particular care to limit sharply the effect of the decision. Repeatedly, the precise holding is stated in terms of the facts of that case: the use against the defendant of his own incriminating words deliberately and secretly

* This is the practice mentioned in *Rigney* v. *Hendrick*, 355 F.2d 710, 714 (3d Cir. 1965).

elicited after indictment in the absence of counsel. The distinctive feature of the case is that the evidence was "testimonial" in nature, oral communications which Massiah had the right not to give. Consequently, Massiah's lawyer, unlike Stovall's, had real legal assistance to tender. He could have counseled his client to silence. Thus, the out-of-court services of a lawyer were assured by *Massiah* in defined circumstances: after the commencement of legal proceedings (*i.e.*, indictment), and where there is meaningful legal counselling to be done. *Massiah* acknowledges the paternity of *Spano* v. *New York*, 360 U. S. 315 (1959), and the family resemblance is visible. Both govern post-indictment police questioning in one form or another. Without the crucial factor of testimonial evidence, the instant case cannot be brought within *Massiah's* control. In brief, as observed by Chief Judge LUMBARD, concurring below, *Massiah* should not apply to

> "circumstances which do not ultimately involve the danger of self-incrimination. * * * Only when police conduct threatens to violate a personal right of the defendant that retains vitality during detention—e.g. the privilege against self incrimination—or when police practices unfairly prevent the defense attorney from preparing his case—a literal deprivation of the right to counsel—must a court interfere to guarantee that the right is properly preserved" [R50-51, n. 1].

If *Massiah* cannot today be read as narrowly as its own opinion appears to direct, then it has overstepped its rationale and should fall. Indeed, its rationale but weakly supports the limited holding; it cannot soundly rule Stovall's situation. No more eloquent exposition of *Massiah's* flaws can be set forth than that penned by Justice WHITE

for the dissenting members of this Court. Flatly put, if *Massiah* must be read to control *Stovall*, it should be overruled, for it is operating far outside the proper scope of the right upon which it is founded.

In sum, the Sixth Amendment awarded the defendant no right to be supplied with counsel at Mrs. Behrendt's hospital bedside where there were no legal decisions to be made, no legal counsel to be tendered, and no authoritative legal influence to be exerted over the events, procedures, or results. It would be as well for the petitioner to argue that he had a right to have an attorney present when a Chinese laundryman identified the defendant's bloody shirt found at the site of the murder. Nor did petitioner acquire any greater constitutional protection because the confrontation occurred just after arraignment rather than just before. This point in time calls for a lawyer's participation only where he has legal assistance to offer.

POINT II

The rule of reason, guiding constitutional construction, should condone the action of law enforcement authorities in the presented circumstances.

In essence, the Constitution enjoins upon the states fair and reasonable practices in dealing with those suspected of crime. And what is reasonable depends, to a large extent, upon a realistic view of the circumstances. For law enforcement should not be constrained by an arbitrary rubric.

Here, investigating an extremely vicious crime, the authorities took a suspect into custody, hastening to respect

his right to prompt arraignment. Meanwhile, the sole surviving eyewitness, Mrs. Behrendt, lay gravely wounded. As Judge Moore, dissenting from the panel's reversal below, aptly pointed out, it would have been grievous neglect of duty had the police omitted a hospital confrontation [R34-35]. It might have been the last chance for the defendant to be definitively exonerated. And as things appeared at that time, the improvised confrontation could not be delayed to improve the probity of the result.

Implicitly, *Miranda* v. *Arizona*, 384 U. S. 436 (1966), counsels the states to pursue investigation of crime apart from interrogation of the accused. Surely, in availing themselves of the earliest (and perhaps last) opportunity for the witness to view the suspect, the authorities here were acting in full accord with sound principles of investigation.

> "The police should not have overlooked the possibility of his exoneration, which could be easily and swiftly resolved by 'quick verification' in a confrontation." *Kennedy* v. *United States*, 353 F.2d 462, 464 (D. C. Cir. 1965).

It may be countered that, while it was commendable for police to present the suspect to Mrs. Behrendt, it was error of constitutional magnitude to present her affirmative identification to the jury at the trial. Parenthetically, it should be noted that the law of New York allows proof of a prior identification only when identity is in issue, and then only from the witness who personally made the previous identification [N. Y. Code Crim. Proc. §393(b); see *People* v. *Trowbridge*, 305 N. Y. 471 (1953); *People* v. *Caserta*, —— N. Y. 2d ——, opinion of December 30, 1966]. However,

what error there might have been in that regard* does not survive the state court's affirmance of the judgment. And it is not here argued that the proof of prior identification in itself constitutes error of constitutional dimension.

The constitutional implications of the identifications obtained without counsel's participation cannot be realistically assessed without consideration of the use made of the evidence at petitioner's trial. Cf. *United States ex rel. Fernanders* v. *Fay,* 241 F.Supp. 51 (S.D.N.Y. 1965); aff'd *sub nom. United States ex rel. Fernanders* v. *Wallack,* 359 F.2d 767 (2d Cir. 1966); *cert. denied* —— U. S. —— (1966). While obviously the petitioner did not benefit from the confrontation by a negative identification, he did derive a major benefit: the incident provided him with his only defense. True, the prosecutor, perhaps anticipating that identification would be the paramount issue at trial, mentioned the hospital incident in his opening —a costly "blunder" [R32]. But it was the defendant who exploited the evidence in his own cause. The first proof of the hospital confrontation was adduced by the defense in cross-examination of a prosecution witness who had attended it. Inadmissible if sought by the People, this evidence formed the cornerstone of the defense: that Mrs. Behrendt identified the defendant in court not as the culprit she saw committing the crime, but as the person the police brought to her *as the culprit* in her hospital room. Indeed, the petitioner's present argument attacking the fairness of the "show-up" procedure, which consumes the major part of his brief [pp. 9-11, 14-16], echoes the defense at trial

* In his brief to the United States Court of Appeals petitioner conceded that the foundation for Mrs. Behrendt's testimony of prior identification had been laid by defense counsel (petitioner's brief to Court of Appeals, 2d Cir., p. 48).

wherein the very factors recited to this Court were stressed to the jury to undercut the reliability of Mrs. Behrendt's courtroom identification of Stovall (Record on Appeal to the New State Court of Appeals, folios 4017-4027).

Chief Judge LUMBARD, concurring in the *en banc* decision below, concluded on the basis of the trial record that the "fairest method of handling" the identification issue was to let the jury know the full facts concerning the hospital room procedure [R53-54]. Judge FRIENDLY, writing for the majority of the panel below [R29], found "troublesome" the failure of the defense to object to the District Attorney's opening reference to the hospital identification, which, he felt, removed significance from the defense elicitation of the proof. However, while seeing "no real excuse for this omission," Judge FRIENDLY passed over the point, noting only his "doubt that the Supreme Court would permit so demanding a standard in a capital case." First, it should be recognized that this is not a capital case in any real sense, in view of the announced intention of the Governor of New York to commute all death sentences pronounced before capital punishment was restricted in New York, including Stovall's [see Appendix II, p. A2, *infra*]. Secondly, Judge FRIENDLY's doubt appears ill-founded; it is not an unduly exacting standard to deprive a defendant of claims of error predicated upon counsel-chosen trial tactics. For it is quite apparent from the record that the petitioner's use of the evidence was no mere response to the prosecutor's ill-advised opening announcement.

Such use by the defendant of otherwise inadmissible evidence, the high court of New York has recently ruled, deprives him of the claim of error [*People* v. *DeRenzzio*,

——N.Y.2d —— (Decided December 30, 1966; *People* v. *Castro,* —— N.Y.2d ——(decided December 30, 1966)]. The right to counsel itself imports meaningful representation on trial by a skilled advocate. His trial tactics must be regarded as the product of reasoned choice and cannot be so easily ignored or overruled by appellate counsel who, with benefit of hindsight, deems the election a poor one.

Thus, in the present case, the course followed by the police in obtaining a hospital identification was fair and reasonable and not to be deterred by an exclusionary rule. The results of that confrontation were proved at trial by the defense as part of a calculated, counsel-directed strategy, and hence the introduction of the evidence entailed no abridgment of the defendant's constitutional rights.

Conclusion

The order and judgment of the Court of Appeals for the Second Circuit,* en banc, *dated January 31, 1966, should be affirmed.

Respectfully submitted,

H. Richard Uviller
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New York County
Counsel to
New York State District Attorneys' Association, *Amicus Curiae*

Eric A. Seiff
Assistant District Attorney
Of Counsel

January, 1967

Appendix I

CITY OF PHILADELPHIA

January 20, 1967

H. Richard Uviller, Asst. District Attorney
New York County District Attorney's Office
155 Leonard Street
New York, New York 10013

Dear Mr. Uviller:

Please be advised that we of the Law Department represent the Police Department of the City of Philadelphia and that the following information, in response to your inquiry, is being submitted to you on behalf of the Philadelphia Police Department:

(1) Since December 1964 it has been the practice of the Philadelphia Police Department to give the Voluntary Defender and private defense counsel 72 hours' notice of the weekly formal line-up. Since the adoption of this procedure no defense attorney has appeared at the line-up.

(2) The formal line-ups in Philadelphia in every instance have been held after the preliminary arraignment and detention of the suspect on a prior charge.

(3) The notification procedure mentioned above applies to persons suspected of both felonies and, occasionally, misdemeanors.

Please let me know whether you desire any additional information concerning the operation of the Police line-up in Philadelphia.

Very truly yours,

s/ Theodore H. Lunine
Assistant City Solicitor

Appendix II

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY

January 17, 1967

Mr. Eric Seiff
Assistant District Attorney
New York County
New York, N. Y. 10013

Dear Mr. Seiff:

Pursuant to your request of January 16th, I am enclosing a copy of the Governor's statement with respect to his policy on commutations.

I am not able to send you the copy of Theodore Stovall's letter which you requested since we must treat all such correspondence as confidential. It should be noted, however, that, in accordance with the policy announced in the enclosed press release, all condemned prisoners were advised in the Fall of 1965 of the Governor's intention to commute their sentences upon the affirmance of their conviction by the Court of Appeals. All those prisoners whose cases had been finally affirmed were advised that their sentence would be commuted on a specific date unless they requested a delay. All those whose sentences had not been finally affirmed as of that time were informed that their sentence would be commuted shortly after the final affirmance unless they specifically requested a delay.

In accordance with this policy, several sentences have been commuted and all remaining sentences will be commuted.

Sincerely yours,

David G. Hassi
Assistant Counsel

Enclosure

Appendix II

FOR THE CONVENIENCE OF THE COURT, the statement of the Governor released on June 1, 1965, is set forth in its entirety below:

STATEMENT BY GOVERNOR ROCKEFELLER

In view of my action today approving the bill with respect to capital punishment, it is also my intention that, without inquiring into the individual merits of each case, persons now convicted and sentenced to capital punishment, who are not subject to capital punishment under the new law, will be granted executive clemency and their sentences commuted to life imprisonment when their cases have run their courses in the courts. As to persons who would still be subject to capital punishment under the new law, I shall continue to review the individual merits of each case before deciding whether to grant executive clemency.